

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC, JOHN
WILEY & SONS, INC., and PENGUIN
RANDOM HOUSE LLC

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through 5,
inclusive

Defendants.

Case No. 1:20-CV-04160-JGK

**SUPPLEMENTAL DECLARATION OF
ELIZABETH A. MCNAMARA IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO INTERNET
ARCHIVE'S MOTION FOR SUMMARY
JUDGMENT**

Pursuant to 28 U.S.C. § 1746, I, **ELIZABETH A. MCNAMARA**, declare as follows:

1. I am an attorney duly admitted to practice law before this Court and a partner of Davis Wright Tremaine LLP, counsel for plaintiffs Hachette Book Group, Inc. (“Hachette”), HarperCollins Publishers LLC (“HarperCollins”), John Wiley & Sons, Inc. (“Wiley”) and Penguin Random House (“PRH”) (collectively, “Plaintiffs” or “Publishers”) in the above-captioned action. I submit this declaration in support of the Plaintiffs’ Opposition to Internet Archive’s Motion for Summary Judgment (the “Opposition”). Except as otherwise indicated, I make this declaration based on discovery in this case, as referenced by citation, or my personal knowledge.

2. On December 24, 2021, IA served its Objections and Responses to Plaintiffs’ Second Set of Interrogatories. (A true and correct copy of Defendants’ Response to Interrogatory No. 21 is attached hereto as Exhibit 1.)

3. Annexed hereto as Exhibit 2 is a true and correct copy of excerpts from the transcript of the December 1, 2021 deposition of Chantal Restivo-Alessi.

4. Annexed hereto as Exhibit 3 is a true and correct copy of excerpts from the transcript of the November 19, 2021 deposition of Jeffrey Weber.

5. Annexed hereto as Exhibit 4 is a true and correct copy of excerpts from the transcript of the December 10, 2021 deposition of Alan Pavese.

6. On May 25, 2020, Dr. Imke Reimers, together with Dr. Abhishek Nagaraj, published a draft article titled “Digitization and the Demand for Physical Works: Evidence from the Google Books Project.” (A true and correct copy of Exhibit 4 to the Deposition of Dr. Reimers, reflecting the May 25, 2020 draft of the article, is annexed hereto as Exhibit 5.) The draft article was published on SSRN. *See id.*

7. Annexed hereto as Exhibit 6 is a true and correct copy of excerpts from the transcript of the November 12, 2021 deposition of Alison Lazarus.

8. Annexed hereto as Exhibit 7 are true and correct copies of spreadsheet produced by OverDrive in this action, reflecting OverDrive checkout and revenue data.

9. On August 9, 2021, Internet Archive filed a letter requesting a pre-motion discovery conference regarding a contemplated motion to compel the Publishers to produce, *inter alia*, additional financial data, including monthly sales data for the Works in Suit and sales data for works other than the Works in Suit. Plaintiffs filed their response on August 12, 2021 stating the reasons why it should not be compelled to produce this data. Ultimately, Internet Archive agreed to withdraw those requests voluntarily as part of a global agreement between the parties resolving various discovery disputes. On January 14, 2022, the parties filed a joint letter informing the Court that they had “resolved the various issues identified in [the August 9, 2021 letter].” (True and correct copies of the August 9 and 12, 2021 and the January 14, 2022 letters are attached hereto as Exhibit 8.)

10. On January 28, 2022, IA served its Second Amended Privilege Log. (A true and correct copy of the entries from IA's Second Amended Privilege Log asserting privilege over documents described as "Communication concerning attorney advice on CDL legal strategy" or "Communication concerning attorney advice on NEL legal strategy" is attached hereto as Exhibit 9.)

11. Annexed hereto as Exhibit 10 is a true and correct copy of excerpts from the transcript of the October 18 and 19, 2021 deposition of Lila Bailey.

12. In response to the COVID-19 pandemic, a small number of academic libraries instituted or participated in digital lending programs, which IA identifies in its motion:

- a. According to its website, HathiTrust provided access to digital materials for "member libraries that have experienced *unexpected* or *involuntary*, *temporary* disruption to normal operations, requiring it to be closed to the public, or otherwise restrict collection access services." *See Emergency Temporary Access Service*, HATHI TRUST, <https://www.hathitrust.org/ETAS-Description>, (last visited Sept. 2, 2022) (emphasis in original).
- b. According to its website, Carnegie Mellon University provided its members digital access "[f]or the first 6 weeks of Fall [2020]" to "60 individual titles for virtual course reserve." *Introducing Controlled Digital Lending*, CARNEGIE MELLON UNIVERSITY, <https://www.library.cmu.edu/about/news/2020-10/introducing-controlled-digital-lending>, (last visited Sept. 2, 2022).
- c. According to a presentation by Erin Weller and Joan Lindsay of Michigan State University, Michigan State University provided its members digital

access to “206 different texts,” citing the pandemic as a rationale. *See* Erin Weller and Joan Lindsay, *Case Study on Implementation of CDL*, MICHIGAN STATE UNIVERSITY, (Jan. 21, 2021), slides 2 and 14, <https://www.slideshare.net/BaltimoreNISO/weller-and-lindsay-case-study-on-implementation-of-cdl>.

- d. According to an article in the International Journal of Librarianship by Qinghua Xu, Leon Lin and Xiaohan Wu of NYU Shanghai, NYU Shanghai instituted a “temporary . . . implementation of CDL.” *See* Qinghua Xu, Leon Lin and Xiaohan Wu, *Implementing Controlled Digital Lending with Google Drive and Apps: A Case Study at the NYU Shanghai Library*, INT’L JOURNAL OF LIBRARIANSHIP, (July 10, 2021), <https://journal.calajol.org/index.php/ijol/article/view/193>.
- e. According to its website, Miami University implemented a “short-term lending service” that provided digital access to its members in connection with “efforts to address concerns about physical distancing on campus during the time of the COVID-19 pandemic.” *See Limited Online Library Access Lending Service*, MIAMI UNIVERSITY, <https://www.lib.miamioh.edu/use/borrow/lola/>, (last visited Sept. 2, 2022).
- f. According to its website, CalTech developed a digital lending system “to help Caltech students and faculty continue their studies and work during the global COVID-19 pandemic.” *See Caltech Digital Library Borrowing System*, CALTECH DIBS, <https://caltechlibrary.github.io/dibs/>, (last visited Sept. 2, 2022).

g. According to its website, the University of Florida implemented a digital lending program in response to the “struggle[] to provide access to print collections during the pandemic.” *See Sustaining Access Responsibly with Controlled Digital Lending*, AFFORDABLE UF, <http://affordabletexts.ufl.edu/sustaining-access-responsibly-with-controlled-digital-lending/>, (last visited Sept. 2, 2022).

13. Annexed hereto as Exhibit 11 is a true and correct copy of a blogpost by Brewster Kahle dated April 27, 2021 and entitled *Internet Archive Launches New Pilot Program for Interlibrary Loan*, which is available at <http://blog.archive.org/2021/04/27/internet-archive-launches-new-pilot-program-for-interlibrary-loan/>.

14. Annexed hereto as Exhibit 12 is a true and correct copy of excerpts from the transcript of the October 22, 2021 deposition of Jacques Cressaty.

15. Internet Archive has, as part of its wider mass digitization and distribution program, posted unauthorized ebook versions of the following works that are also available as authorized library ebooks: *The Glass Castle*, *The Hunger Games*, *Beyond Magenta: Transgender Teens Speak Out*, *Catch-22*. (True and correct copies of OverDrive webpages offering each of these books are annexed hereto as Exhibit 13.)

16. Internet Archive’s patron witness Laura Gibbs testified that she relied on Internet Archive to provide students with ebooks via Internet Archive’s Website that were also available as authorized library ebooks – including Chitra Banerjee Divakaruni’s *Palace of Illusions*, *Neela: Victory Song* and *The Conch-Bearer*. (True and correct copies of OverDrive webpages offering each of these books are annexed hereto as Exhibit 14.)

17. Annexed hereto as Exhibit 15 is a true and correct copy of excerpts from the transcript of the March 15, 2022 deposition of Benjamin Saracco.

18. Annexed hereto as Exhibit 16 is a true and correct copies of the webpage

Signatories to the Position Statement on Controlled Digital Lending by Libraries, CONTROLLED DIGITAL LENDING BY LIBRARIES, <https://controlleddigitallending.org/signatories>, (last visited September 2, 2022).

19. Annexed hereto as Exhibit 17 is a true and correct copy of an email chain produced in this action bearing bates number HC0015518.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on September 2, 2022.

/s/ Elizabeth A. McNamara
ELIZABETH A. MCNAMARA